



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NUMBER.: 2733/2012

In the matter between:

BANTUBOMZI LIVINGSTONE MAJOLA First Plaintiff

JEFFREY JERRY BRANDERS Second Plaintiff

And

MINISTER OF POLICE N.O. First Defendant

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS N.O. Second Defendant

MINISTER OF JUSTICE & CONSTITUTIONAL Third Defendant

JUDGMENT

Beshe J

[1] The plaintiffs instituted action against the defendants for damages arising out of their arrest by officials of the first defendant on the 2 April 2011 as well as their subsequent detention. Plaintiffs' first claim is against the first defendant being for unlawful arrest and detention in respect of which they claim damages in the sum of R200 000.00. Their second claim is against first, second and third defendants in respect of which they claim damages in the sum of R450 000.00 against the defendants jointly and severally in respect of their further detention

following their first court appearance. The second claim was later withdrawn against the third defendant and the trial proceeded against first and second defendants.

Plaintiffs' particulars of claim

[2] Plaintiffs' claim is based on the following assertions:

They were arrested for theft on the 2 April 2011 at Klipplaat, Jansenville by members of the first defendant namely Chris Gumede and Evino Brown. They were thereafter detained at the Klipplaat Police Station until 4 April 2011. The arrest and detention were unlawful and without justification in that the arresting officer/s were not armed with a warrant that authorised their arrest or alternatively the arresting officers did not have a reasonable suspicion that they had committed the alleged offence.

They failed to exercise their discretion whether to arrest the plaintiffs.

They failed/omitted to explain plaintiffs' constitutional rights to them. As a consequence of the unlawful and wrongful arrest and detention, their dignities were impaired, so were their reputations.

They were deprived of their physical freedom.

They made their first court appearance at the Jansenville Magistrates Court on 4 April 2011. The matter was postponed four times without the plaintiffs being afforded the right to apply for bail. They were released on warning on 29 April 2011. The matter was postponed three times subsequent to their release on warning and being placed under house arrest. The charge/s were withdrawn against them on the 4 November 2011. They allege that the detention following their first court appearance was wrongful and unlawful for the following reasons:

Officials of the second defendant (being the prosecutors) failed in their duty to acquaint themselves with the contents of the docket, had they done so, it would have been obvious to them that there was no justification for their continued detention. They failed to inform the Magistrate that there were no objective facts that linked them to the alleged theft. They failed to take steps to ensure that plaintiffs were released from custody. The two police officers concerned knew or ought to have been aware that there were no reasonable or objective grounds for plaintiffs' continued detention. They failed to inform the public prosecutor of this fact.

Defendants' Plea

[3] Defendants admit that plaintiffs were arrested on 2 April 2011 without a warrant by members of the first defendant. First defendant's officials acted in accordance with the provisions of Section 40(1)(b), alternatively 40(1)(e) of the Criminal Procedure Act. Constable Brown reasonably suspected the plaintiffs of having committed a Schedule 1 offence or that they were in possession of suspected stolen property.

Issues to be determined in respect of merits

[4] Issues having been crystallised by means of pleadings, it became apparent that this court is required to determine the lawfulness or otherwise of the arrest. In particular whether the arresting office's suspicion was reasonable in the circumstances. As well as whether the officials of the second defendant failed to acquaint themselves with the contents of the docket. Whether if they did, they would have realised that there was no justification for the plaintiffs to be kept in custody. In my summation of the evidence, I will endeavour to concentrate on those parts of the evidence that have a bearing on the issues to be determined.

[5] Both plaintiffs testified in support of their case. Four witnesses testified on behalf of the defendants. Sergeant Brown, Constable Gumede, Sergeant Sijaji and Mr Cobban. The latter was a Prosecutor attached to the Jansenville Magistrate Court during the material times. He testified virtually.

[6] The following emerged from first plaintiff's evidence:

He is a 63-year-old unemployed male person. At the time of his arrest, he was a casual worker employed by the Klipplaat Municipality. On the day of his arrest, he was accosted by Sergeant Brown (Brown) outside his house as he was preparing to make a fire with firewood. Brown invited him to accompany him to the police station where he will inform him of the reason for taking him to the police station. At the time Brown was in the company of a male foreign national who is the owner or runs a restaurant in Greenpoint. A woman was also in their company. It seems to be common cause that the shop keeper was Mr Mohamed (Mohamed) and the lady in their company was one Ms Nomvula (Nomvula). Before being taken to the police station Brown did not conduct a search at his house. Once at the police station Brown informed him that it was alleged that he stole items from the restaurant owner's bakkie. He denied that he stole any items at the said shop out of the owner's bakkie. Mohamed, Nomvula and Brown moved to a different office whether plaintiff heard Nomvula remarking that "he is the person who took items out of Mohamed's bakkie". Brown told him he was under arrest and locked him up even though he was denying that he stole any items. He testified that he knew second plaintiff but denied they were friends. He denied that he admitted that he was at the shop for purposes of buying cigarettes which he ended up not buying.

[7] The following emerged from second plaintiff's evidence:

He is a 50-year-old male farm worker. He was arrested on 2 April 2011 on his way home from a tavern after his wife pointed him out to Brown and Gumede. He was taken to the police station where there was mention of goods that were stolen from Mohamed's shop. He disavowed having visited the said shop on that day. Brown spoke to Nomvula aside and thereafter locked him up. He denied that he admitted having been at Mohamed's shop on the day in question. During cross-examination both plaintiffs were questioned about their previous brushes with the law. Plaintiffs denied having been obstructive, aggressive and evasive during questioning.

Defendants' case

[8] Brown testified that he was on night duty with Gumede when they received a report about a theft out of Mohamed's motor vehicle. Mohamed informed them that he was offloading stock from the van and taking it inside the shop. Once inside the shop with a batch of the stock, someone apparently also helped himself to the stock inside the motor vehicle. According to Mohamed, first plaintiff offloaded the good whilst Rasta, second plaintiff as he is known locally, kept him busy at the counter to distract him. This he did by pretending to buy cigarettes which he ended up not buying. Nomvula also confirmed to them that the plaintiffs were at the shop around the time the offence was committed, or goods went missing. Brown went in search of the plaintiffs whom he knew as they were local folk who had also been in conflict with the law. He spoke to first plaintiff's brother, Whe-whe at a tavern. He observed that he had Peter Stuyvesant cigarettes and asked where he got them. Peter Stuyvesant is however not listed as one of the types of cigarettes that were stolen from Mohamed's motor vehicle. First plaintiff's brother told him he got same from first plaintiff. The tavern owner also told him that first plaintiff tried to sell cartons of cigarettes to her. He went in search of plaintiff, found him, and

questioned him about the theft. Plaintiff denied complicity in the theft. He became aggressive and uncooperative. Both plaintiffs were also pointed out by Nomvula at the police station. This, according to Brown, prompted second plaintiff to admit having been at the shop. He could not recall if first plaintiff also later admitted having been at Mohamed's shop. Brown gave the following reasons for arresting the plaintiffs:

- Questioned them about what Mohamed and Nomvula said.
- Second plaintiff later admitted having been at the shop.
- The value of the stolen goods was high.
- They were not cooperative and became aggressive.
- If he did not arrest them, they would interfere with state witnesses.
- It was not the first time for him to arrest the plaintiffs.

Brown conceded during cross-examination that had he searched plaintiffs' houses and found the stolen goods, he would have had a good reason to suspect they stole the goods. He was also questioned at length about his statement. It emerged that even though according to him Mohamed told him plaintiff took the goods, same does not appear from his statement. Asked why that is not reflected in his statement, he stated he only wrote the important aspects. During questioning by court, it emerged that when they visited Mohamed's shop to attend to his complaint, there were customers going in and out of the shop. Also, that no one saw any of the plaintiffs remove the goods from Mohamed's motor vehicle. That complainant had not deposed to a statement before the arrest. His statement does not mention what he alleges he gathered from first plaintiff's brother and Nomthandazo, the tavern owner.

[9] It is worth mentioning that Brown deposed to two statements, the first one bears the date 3 April 2011 at 03:30, even though this is supposed to be date and time the statement was commissioned, it is however not commissioned. His second statement was sworn to on 5 October 2015. It is apposite to reproduce the material parts of the two statements:

First statement

‘In this night, at about 19h20, I receive a call via radio of a complaint at the Bafana Supermarket from the owner Mr Hussin Mussa, about theft that occurred at he’s shop from he’s vehicle that was stationary whilst he off load he’s stock that he bought for the shop.

Mr Hussin Mussa explained to me how the stock was stolen and that he saw Bantubomzi residing at Greenpoint and Jeffrey Branders residing in (indistinct). The goods valued at R2800,00 (Two thousand Eight Hundred Rand) went missing. Upon further investigation myself and S/Cst Gumede caught up with this two suspects in this incident and brought them to the Community Service Centre after they were positively identified by Mr H Mussa as the one’s he saw at the shop and suspect them from stealing his goods. [my underlining]

Mr Hussin Mussa’s brother and partner at the Bafana Supermarket also said that he saw both two (02) suspects inside the shop, at about the time the theft occurred. My witness of this incident at the time was my partner S/Cst C. Gumede.

During this incident, I questioned both of the allege suspects who were very rude and aggressive, and don’t want to co-operate. They turn violent and threatened myself and Cst Gumede and were using vulgar language against both of us.’

Brown’s second statement

‘On Saturday 2011-04-02 I was officially on duty. My shift were scheduled as from 18h45 until Sunday 2011-04-03 at 07:00 am. My partner for this shift were Const C. Gumede. Our duties consist of attending of complaints in our area (Klipplaat) as we were posted outside on the patrol vehicle.

I can recall attending a complaint at a shop in Greenpoint, Klipplaat, named Part of Line shop. The owner is a foreigner. I can also recall that I noted this events down in my pocket book (SAP 206).

Currently I can not be able to retrieve these specific pocket book for reasons beyond my controle. Reason for this, is procedure when handing in pocket books that's full, as well as the fact that the controller of these, are no longer employed in the SAPS. Unable to provide and help me in this regard.'

[10] In a statement which was commissioned by Brown on 24 April 2011, Gumede states as follows:

'At about 19:30 on 2011-04-02 we received a complaint at a Somalian shop in Greenpoint, Klipplaat about theft out of a m/v. on our arrival we spoke to the owner who were there with a lady called Nomvula they told us that they saw Bantubomzi Majola and Jeffrey Branders taking some of the stock he was offloading out of his vehicle and when he the owner went out for them they ran away with the things into the dark.

We asked them wether they could or would be able to identify them and they said yes. The owner drove with his vehicle and Mrs Nomvula with us they pointed Mr Bantubomzi and Branders out to us the people wo took the things out o the bakkie and ran.'

[11] Mr Hussein Massa Mohamed's statement which appears to have been commissioned on 2 April 2011 at 20:40 gives the following account of the events surrounding the alleged theft of goods out of his motor vehicle:

'I Mohammed Husin Mussa sate under oath that on 2011-04-02 between 19:00 and 19:15 I was at 43 Greenpoint busy offloading goods of the shop. The bakkie was standing inside the yard.

There were people inside the shop and I wanted to go and help them before I finish offloading. I helped the other people finish and a rastaman was standing at the door and asking to buy cigarettes and then he said I must leave them and then ask for something else and told me to leave it. The whole time he was looking outside. His brother was standing at the gate, Bantubomzi. When the Rastaman and Bantubomzi left I went to the Bakkie and

finish offloading and noticed that fifteen 15 x (10) tens of Savanna Cigarettes. Five (5) x 10s (ten) (Chicago) Chicago cigarettes, One (1) x 10s (ten) Craven A cigarettes, a box containing (20) twenty, 5g boxers, one's packet containing Fourteen (14), 125g boxers, ten (10) One hundred 100g boxer and eggs. The value of the missing stuff from the bakkie ± R2800.

I suspect Bantubomzi and the Rastaman because they were the only person there and when I came out they disappeared. I contacted the police and after the police left I went to look for Bantubomzi and he was not at home. We, me and Nomvula went to Lovers tavern looking for him and met his wife and the was. She told us that she saw him carrying a big bag with goods. I could not get him and went to open the case at the police station.' [my underlining]

[12] In his viva voca evidence, Gumede stated that Mohamed informed them at his shop that he saw first plaintiff take goods from his motor vehicle and running into the darkness. This was also confirmed by Nomvula. Gumede also mentioned that the plaintiffs were known to him and had several brushes with the law. Responding to a question why Brown did not mention that Mohamed said he saw first plaintiff remove goods from his motor vehicle, he responded by saying he may have missed hearing that because there were people who were going in and out of the shop at the time.

[13] Sergeant Sijaji who was assigned to investigate the matter the day following the arrest of the plaintiffs was the next to testify on behalf of the defendant. Even though he needed to obtain further statements, he felt that the plaintiffs could not be released from custody because he was still awaiting their previous conviction records; he felt they were a threat to the witnesses because they saw them at the police station. Klipplaat being a small place where everyone knows each other. The plaintiffs are known to be in and out of jail. He was having difficulty getting hold of Nomvula in order to obtain a statement from her. He could also not get hold of the shop keeper. However, before the 20 April 2011 he informed the public prosecutor that he could not get hold of witnesses and charges against the plaintiffs should be withdrawn. He does not

know why this was not done. A statement was obtained from first plaintiff's wife in which she denied any knowledge about the alleged theft.

[14] The last witness to testify in support of the defendants' case was Mr Allan James Cobban who was a Public Prosecutor at Jansenville Magistrates' Court at the time. Cobban explained that he did not have an independent recollection of the circumstances regarding the criminal case the plaintiffs were facing. He relies on documents forming defendants' trial bundle where it concerns him. He confirmed that it appears that he was the prosecutor when the plaintiffs appeared in court for the first time in connection with the matter. In his assessment of the evidence comprising according to him of two eyewitnesses who placed them at the scene, and possibly a third witness, there was a prima facie case against the plaintiffs. He mentioned that the plaintiffs have previously committed Schedule 5 offences. For those reasons and based on a circular issue by the Director of Public Prosecutions not to easily grant bail in respect of Schedule 5 offences, he decided that the plaintiffs should not be released on warning or given police bail. Adding that it would have been reckless of him to release the plaintiffs. He informed the investigating officer to conduct further investigations but does not recall if he made endorsement to this effect on the investigation diary. He discussed the matter with one Inspector Gentle about an informer. There is no mention of Gentle's role in the docket. Further that at some stage the plaintiffs had been charged in connection with possession of a Rifle. He testified that after being informed that the investigations have collapsed before one plaintiffs' appearance, namely 20 April 2011, charges could not be withdrawn because the court recording machine was not working. It is common cause that when the plaintiffs were released on warning on a later date. Cobban was not the Public Prosecutor in court on the day.

Parties' submissions on the merits of plaintiffs' claims

[15] It was submitted on behalf of the plaintiffs that their arrest was wrongful and unlawful in that the arresting officer/s when effecting the arrest did not have a reasonable suspicion that the plaintiffs had committed Schedule 1 offence. This, so it was argued, because there was no clear and acceptable evidence of anyone observing the plaintiffs removing the goods from Mohamed's motor vehicle. None of the stolen good were found in the possession of the plaintiffs. There is no evidence/allegation that they admitted to stealing the goods in question. None of their homes were searched even though they were arrested in the vicinity of their homes. Even if the arresting officer/s is/were of the view that the jurisdictional factors to be satisfied were present, they were still required to exercise a discretion whether to effect an arrest, to place the plaintiffs under arrest or use less invasive means to bring them to court. Seeing also that the plaintiffs were locals who were known to the police. It was submitted further that Brown and Gumede could not have formed a reasonable suspicion that the plaintiffs committed a Schedule 1 offence if regard is had to the following factors:

According to the arrest statement by Brown of the 3 April 2011, he was told by the owner of the shop that he saw the plaintiffs inside the shop at the time the goods were removed from his motor vehicle. This was also confirmed by the shopkeeper's brother that the plaintiffs were inside the shop whet the theft occurred. Yet, according to Brown's partner, Gumede, they were informed by Mohamed and Nomvula that they saw plaintiffs remove the goods from the former's motor vehicle and running away with them. Gumede's statement was seemingly recorded on the 24 April 2011 and filed on the 28 April 2011. These factors are also relevant to plaintiffs' second claim as to what information was considered or supposed to have been considered by the public prosecutor for the

plaintiffs' further detention following their first court appearance. Mohamed's statement on the other hand does not disclose that he saw the plaintiffs remove goods from his motor vehicle. All he says is that he suspects them because "they were the only persons there and when I came out, they disappeared". In the same breath, he suggests that there were other customers at the shop he was serving. This suggests a movement of people in and out of the shop. The same was confirmed by Gumede in his evidence that customers were coming in and out of the shop. A close reading of Mohamed's statement also reveals that it is in itself contradictory. [my underlining]

[16] It was further submitted on behalf of the plaintiffs that the first defendant is liable for the period of plaintiffs' detention, including the period after their first court appearance. That second defendant is also liable for the damages suffered by the plaintiffs in that his employees (the prosecutor/s) failed to acquaint themselves with the content of the docket from which it would have been obvious that there were no reasonable grounds or justification for the arrest and continued detention of the plaintiffs. By also failing to timeously withdraw charges against the plaintiffs.

Defendants' submissions

[17] As indicated, first defendant pleaded that the arrest of the plaintiffs was carried out lawfully in terms of Section 40(1)(b),¹ alternatively of Section 40(1)(e)² of the Criminal Procedure Act. There is however no suggestion that the plaintiffs were found in possession of anything the arresting officer reasonably suspected to be stolen.

¹ Section 40(1)(b) provides that: (b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.

² Section 40(1)(e) provides that: (e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonable suspects of having committed an offence with respect of such thing.

[18] Unsurprisingly, in argument first defendant seemed to be placing reliance of Section 40(1)(b) only. It was argued that the suspicion was reasonable because the plaintiffs were the only persons in the shop when the goods were stolen. This is however not supported by evidence. The goods are alleged to have been stolen from Mohamed's motor vehicle not inside his shop. There were clearly other customers waiting to be served inside the shop. Hence Mohamed decided to attend to them first before he continued to offload the goods from his motor vehicle. It was suggested that the plaintiffs were arrested on the following basis:

- They were also implicated by Nomvula.
- Being evasive and obstructive during questioning.
- Having been identified by eyewitnesses.
- Could not explain why they were at the shop.
- First plaintiff's brother had been found with cigarettes he could not afford.
- The plaintiffs being known criminals.
- Information from first plaintiff's wife. Information from NomT's Tavern proprietor.

As indicated earlier, no statement was obtained from the tavern owner or first plaintiff's brother Whe-whe. Needless to mention that none of this is contained in Brown's statement that was made two days after the plaintiffs' arrest. Neither is it contained in Gumede's statement that was made weeks later.

Discussion

[19] There is a thread that ran through the defendants' witnesses' evidence that the plaintiffs were known criminals. Brown and Gumede also seem to have taken issue with the plaintiffs having been somewhat belligerent during questioning. In my view, these can hardly be reasons for formulating a reasonable suspicion that a person has committed an offence. First plaintiff's wife, in a statement obtained by the investigating officer on 7 April 2011, denies any knowledge about this matter. Contrary to what Brown and Gumede suggested, that she told them about first plaintiff carrying a bag full of goods. Up until the charges were withdrawn against the plaintiffs, no statements had been forthcoming from the proprietor of the tavern. None was obtained from plaintiff's brother Whe-whe and none was obtained from Nomvula. Nor was one obtained from Mohamed's brother who is mentioned in Brown's arrest statement as having seen the plaintiffs inside the shop at about the same time the theft occurred. Not that this would have made any much difference because being inside Mohamed's shop, without more does not lend any credence or weight to the suspicion. Needless to say, Brown makes no mention in his arrest statement of the information allegedly received from the tavern owner, first plaintiff's wife and first plaintiff's brother. And yet it was meant to explain what led to the plaintiffs' arrest. What informed or fuelled his suspicion that they stole Mohamed's goods from his vehicle and led to the arrest. Based on the facts outlined above, can it be said that these facts were sufficient for the arresting officer/s to form a reasonable suspicion that the plaintiffs had committed a Schedule 1 offence. It is trite that the suspicion that leads to an arrest must be reasonably held. Trite also is the principle that the information that was available to the arresting officer at the time of the arrest must be viewed objectively to determine whether the suspicion was reasonable. In

Mabona and Another v Minister of Law and Order and Others³ the following meaning was given to what constitutes as reasonable suspicion:

‘The test of whether a suspicion is reasonably entertained within the meaning of s 40(1)(b) is objective (S v Nel and Another 1980 (4) SA 28 (e) at 33H). Would a reasonable man in the second defendant’s position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiffs were guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen? It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, ie something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.’

[20] I have already pointed out that Mohamed stated that he suspected that the plaintiffs had stolen goods from his motor vehicle because they were the only people there and when he came out, they disappeared. In the same breath however, he states that there were customers he needed to attend to. Granted that Gumede’s statement was made weeks after the incident, it is however noteworthy that he says at the time of the arrest they had information from two eyewitnesses, Mohamed and Nomvula who said they saw the plaintiffs taking out goods from Mohamed’s motor vehicle. Surely if Nomvula and Mohamed were talking to both Brown and Gumede as the latter suggests, Brown must also have heard that and would have included that as a reason for arresting the plaintiffs. I accept that the arresting officers were not expected to conduct a

³ 1988 (2) SA 654 at 658 E-H.

thorough investigation of the case. But it is clear that the information they had required them to ask a few questions to get a clearer picture of what happened. In order for them to be able to assess whether there was a reasonable suspicion that the plaintiffs committed the offence in question. Brown confirms that at the time of the arrest Mohamed had not yet deposed to a sworn statement.

[21] Contrary to what Gumede stated in his statement (filed weeks after the arrest of the plaintiffs), in his viva voce evidence he said Mohamed told them he saw first plaintiff taking goods from the motor vehicle, not both of them as suggested in his statement. He too did not mention anything about what they were allegedly told by first plaintiff's brother and proprietor of NomT's tavern in his statement.

[22] Both Brown and Gumede testified that both plaintiffs initially denied having been at Mohamed's shop. But that after they were pointed out by the latter and Nomvula at the police station one of them changed to say he did go to the shop. But denied stealing good as alleged. I acknowledge that for the suspicion to be reasonable it need not be based on information that would subsequently be admissible in a court of law.⁴ In *Biyela supra* the court had this to say regarding a reasonable suspicion:

‘[34] The standard of a reasonable suspicion is very low. The reasonable suspicion must be more than a hunch; it should not be an unparticularised suspicion. It must be based on specific and articulable facts or information. Whether the suspicion was reasonable, under the prevailing circumstances, is determined objectively.

[35] What is required is that the arresting officer must form a reasonable suspicion that a Schedule 1 offence has been committed based on credible and trustworthy information. Whether the information would later, in a court of law, be found to be inadmissible is neither here nor there for the determination of whether the arresting officer at the time of arrest harboured a reasonable suspicion that the arrested person committed a Schedule 1 offence.’

⁴ *Biyela v Minister of Police* 2023 (1) SACR 235 paragraph [33].

[23] The difficulty I have with first defendant's evidence is that it is not clear what information they had in order for them to have a reasonable suspicion that the plaintiffs had committed a Schedule 1 offence. Which puts into question their credibility. Their evidence is contradictory. They contradict each other. Important aspects that should have been part of Brown's statement as to what led to the arrest of the plaintiffs are not contained in his statement.

[24] It would seem to me that the plaintiffs' reputation of having had previous brushes with the law, preceded them. This, coupled with the fact that both Brown and Gumede say that they were aggressive and swore at them and were uncooperative. I am not sure what cooperation was expected from them if they denied committing the offence.

[25] The same preoccupation about plaintiffs being known criminals continued after the matter was allocated an investigation officer, Sergeant Sijaji and after it was enrolled in court. When Sijaji took over the case only complainant's statement had been filed. We know what was contained in the said statement. Namely, that he suspected the plaintiffs because they were the only people in the shop, yet in the same statement states that there were customers he needed to attend to. Sijaji however felt he had a strong case against the plaintiffs. Even though it would appear that he still wanted to personally interview Mohamed hence his complaint that he could not get hold of him. I have a hunch he needed him to clarify what was contained in his statement. I am of the view that the statement lacked clarity. Also learnt from Brown that the plaintiffs were aggressive to him during questioning. He too mentioned plaintiffs' reputation describing them as not being good and of having been in and out of prison.

[26] The same applies to Cobban's evidence who testified that he knew the plaintiffs having been a prosecutor in cases where they were involved, some of

them being for Schedule 5 offences. Adding that it would have been reckless of him to release accused on bail for a Schedule 5 offence based on Director of Public Prosecutions' circular. He even engaged a certain Inspector Gentle who was also a friend of his about the matter. Gentle reported to him that his informer was reluctant to testify. He explained that the plaintiffs could not be released even after he was informed that the investigations had fallen through because the recording machine was not working, and the Magistrate could not record by long hand. However, every time the plaintiffs appeared in court, there is a manuscript record of what transpired. For example, date to which the matter is postponed and reason. I do not understand why it was not possible for the Magistrate to record that the charge is withdrawn by state due to insufficient evidence. This cannot be true. On the 20 April 2011 when Cobban was the prosecutor the matter was postponed to 29 April 2011 for a formal bail application. This is after Sijaji had informed him that the charges should be withdrawn because he cannot get hold of witnesses.

[27] In view of the paucity and quality of the information those arresting the plaintiffs had, I am not persuaded that there were good and sufficient grounds for suspecting that the plaintiffs had committed a Schedule 1 offence. The information at Brown's disposal was essentially that because the plaintiffs were within the shop's precinct, they must be the ones who stole goods from Mohamed's vehicle. I am of the view that Brown and Gumede realised that and sought to supplement the information they had as the case proceeded. This by Gumede in his statement made weeks after plaintiffs' arrest and in his viva voce evidence. As well as Brown in his viva voce evidence. It is for the same reason, the paucity of information in the docket when the plaintiffs made their first court appearance that I am inclined to agree with plaintiffs' submission that had the prosecutor conducted his duty carefully by acquainting himself with the contents thereof and properly assessing the information in the docket, he would

have realised that there was no justification for the continued detention of the plaintiffs.

[28] In my view, the first defendant has not discharged the onus of showing that the plaintiffs' arrest and detention was lawful. The first defendant is liable for damages suffered by the plaintiffs as a result of their arrest and detention on the 2 April 2011. The arresting officer failed to do what is suggested in *Mabona supra* namely, analyse and assess the information critically.

[29] By the same token and for the reasons stated above, the first defendant is also liable for the further detention of the plaintiffs after their first court appearance. In the matter of *De Klerk v Minister of Police*⁵ the Constitutional Court after analysing case law, concluded that:

‘[62] The principles emerging from our jurisprudence can then be summarised as follows. The deprivation of liberty, through arrest and detention, is per se prima facie unlawful. Every deprivation of liberty must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons. Since *Zealand*, a remand order by a magistrate does not necessarily render subsequent detention lawful. What matters is whether, substantively, there was just cause for the later deprivation of liberty. In determining whether the deprivation of liberty pursuant to a remand order is lawful, regard can be had to the manner in which the remand order was made.

[63] In cases like this, the liability of the police for detention post-court appearance should be determined on an application of the principles of legal causation, having regard to the applicable tests and policy considerations. This may include a consideration of whether the post-appearance detention was lawful. It is these public policy considerations that will serve as a measure of control to ensure that liability is not extended too far. The conduct of the police after an unlawful arrest, especially if the police acted unlawfully after the unlawful arrest of the plaintiff, is to be evaluated and considered in determining legal causation. In addition, every matter must be determined on its own facts – there is no general rule that can be applied dogmatically in order to determine liability.’

⁵ 2021 (4) SA 585 CC at paragraphs [62]-[63].

The Constitutional Court also held that a reasonable arresting officer may have well foreseen the possibility that as a result of the arrest, the arrested person would be routinely remanded in custody after his first appearance.⁶

[30] In the present case the investigating officer played an active role in having the plaintiffs held in custody after their first court appearance. He testified that because he was still waiting for the plaintiffs' record of previous convictions they could not be released. He felt they were a threat to state witnesses because they saw them at the police station. And also because of their reputation of having been in and out of prison. Also mentioned that they acted violently towards Brown at the police station as he could gather from Brown's statement. It was only after he struggled to get hold of witnesses that he indicated bail could be granted. I have no difficulty in finding that the first defendant is also liable for the plaintiff's detention post their first court appearance. It was much later before the plaintiffs made their appearance in court on the 20 April 2011 that he told the public prosecutor the plaintiffs should be released. We now know that they were only released on warning approximately nine days later.

[31] All that the investigating officer and the prosecutor had on the docket were statements by Mohamed and Brown. These suggested that because the plaintiffs were at the shop around the time the theft was committed, they must have been the people who stole the goods. This can hardly give rise to a reasonable suspicion that they stole the goods.

[32] In my view, both defendants are liable for the damages suffered by the plaintiffs as a result of having been detained following their unlawful arrest.

⁶ De Klerk *supra* paragraph 76.

[33] Besides as was rightly pointed out by plaintiffs' counsel, an arresting officer is not obliged to arrest based on a reasonable suspicion, he has a discretion not to. This is a point that was also made in *Biyela v Minister of Police*⁷ *supra*, where the court stated that:

'Our Legal system sets great store by the liberty of an individual and, therefore the discretion must be exercised after taking all the prevailing circumstances into consideration.'

Similarly, in *Woji v Minister of Police*⁸ it was pointed out that:

'[28] The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person. This is termed a public law duty.'

Quantum of damages

[34] The plaintiffs were detained for two days before they were taken to court on the 4 April 2011. Only the first defendant is liable for damages suffered by the plaintiffs as a result of their detention for two days. Post their first appearance in court, the plaintiffs were detained from 4 April to 29 April 2011, approximately 25 days.

[35] Both plaintiffs are adult males who at the time they testified were 63 years and 50 years old respectively. Both are married with children. They described the condition at the police station holding cells where they were initially held as bad. According to first plaintiff who was locked up alone, throughout the night he was pre-occupied with the fact he had been arrested for something he did not do. The toilet he was meant to use was covered with a blanket. When he removed same, he observed that it was full, smelly and had maggots. Second plaintiff complained that the cell in which he was locked up was dirty with blankets that were stained/soiled with faeces.

⁷ At paragraph 36.

⁸ 2015 (1) SACR 409 SCA at 419 [28].

[36] Not much evidence was given regarding the condition of the facility where they were held after their first appearance in court. We do know however that they were deprived of their freedom for 25 days.

[37] In considering what would be an appropriate award/s for damages I will be alive to the following factors:

- The right to not to be deprived of freedom, arbitrary or without just cause is protected under Section 12(1) of the Constitution.
- What was stated in *Minister of Safety and Security v Tyulu*⁹ namely that:

‘[26] In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which any arbitrary deprivation of personal liberty is viewed in our law. I readily concede that it is impossible to determine an award of damages for this kind of *injuria* with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine the quantum of damages on such facts.’

- The awards made in previous cases which I will have regard to and use as a guide, bearing in mind the facts of this case.

⁹ 2009 (5) SA 85 SCA at paragraph 26.

[38] Having considered all these factors, I consider the following awards to be fair to both the plaintiffs and the defendants.

Claim 1: A sum of R50 000.00 in respect of each plaintiff.

Claim 2: A sum of R200 000.00 in respect of each plaintiff.

Costs

[39] It was submitted on behalf of the defendants that in the event that the court finds in favour of the plaintiffs, costs should be awarded on the Regional Court scale in view of the awards sought. I have not been apprised of any reason/s why costs should not be awarded on Regional Court Scale. I am of the view that that will be an appropriate order to make in this regard.

[40] Accordingly, the following order will issue:

- (a) Judgment is granted against the defendants in favour of the plaintiffs.
- (b) In respect of claim 1, first defendant is ordered to pay a sum of R50 000.00 in respect of each plaintiff as and for damages.
- (c) Interest thereon at the prescribed rate of interest from date of judgment to date of payment.
- (d) In respect of claim 2, first and second defendants are ordered to pay a sum of R200 000.00 in respect of each plaintiff as and for damages jointly and severally, the one paying the other to be absolved.
- (e) Interest thereon at the prescribed rate of interest from date of judgment to date of final payment.
- (f) Cost of suit on the Regional Court Scale.

N G BESHE
JUDGE OF THE HIGH COURT

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Date Heard : 19 and 20 July 2023; 11, 12 and 14 September 2023

Date Reserved : 14 September 2023

Date Delivered : 6 February 2024